



Neutral Citation Number: [2020] EWHC 638 (Ch)

Case No: HC-2017-001837

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST**  
**SHORTER TRIAL SCHEME**

Royal Courts of Justice  
7 Rolls Buildings  
Fetter lane  
London EC4A 1NL

Date: 17/03/2020

**Before :**

**MR JUSTICE BIRSS**

**Between :**

<b>SPRINT ELECTRIC LIMITED</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>(1) BUYER'S DREAM LIMITED</b>	
<b>(2) DR ARISTIDES GEORGE POTAMIANOS</b>	<b><u>Defendants</u></b>

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**Michael Hicks** (instructed by **Moore Blatch**) for the **Claimant**  
**Jaani Riordan** (instructed by **Blake Morgan**) for the **Defendants**

On paper

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BIRSS

**Mr Justice Birss :**

1. The claimant designs, makes and sells digitally controlled industrial electric motor drives. The second defendant provided services to develop the products via his service company, the first defendant. In May 1999 the second defendant was also appointed a director of the claimant company.
2. The claimant brought a claim against the defendants for breach of director's duties (against the second defendant) and breach of contract against the first defendant. The breaches relate to the defendants' withholding of source code from the claimant. The trial judge (Mr Richard Spearman QC) held that the defendants had wrongly withheld the source code ([2018] EWHC 1924 (Ch)). The first defendant's counterclaim that it owned the copyright in the source code failed.
3. By the order of 28<sup>th</sup> September 2018 the judge required the source code to be delivered up to the claimant and directed an inquiry as to damages. The inquiry is ordered at paragraph 3 of the court's order. It is an inquiry as to the damages suffered by the claimant as a result of the breaches of the second defendant's directors duties and the first defendant's duties under three contracts. The contracts were successive, a 1997 contract, a 2000 contract, and a 2015 contract entered into on 10<sup>th</sup> November 2015.
4. The enquiry has been proceeding under the Shorter Trial Scheme (PD 57AB).
5. The Points of Claim dated 22 November 2018 set out a claim for about £6 million. The defendants' Points of Defence were served dated 18<sup>th</sup> January 2019. Various points are taken but briefly put, the entire claim is denied both in terms of causation and quantum. The CMC on the inquiry took place on 27<sup>th</sup> March and 16<sup>th</sup> April 2019. Directions for evidence were given and substantial evidence on the inquiry has now been exchanged. I resolved a dispute about expert evidence on 2<sup>nd</sup> March, allowing the parties to use their existing witnesses as experts. The inquiry is listed for 5 days including 1 day pre-reading in a 2 week window from Monday 11<sup>th</sup> May 2020 with a PTR to take place in the week of Monday 6<sup>th</sup> April. From what I have seen so far, the matter will require careful management to keep it within the time allotted.
6. Just before the brief hearing on 2<sup>nd</sup> March 2020 fixed to deal with the expert evidence, the defendants brought an application to amend the Points of Defence. There was not time to deal with it then. Since this case was in the Shorter Trial Scheme, I suggested that the matter be dealt with under paragraph 2.47 of the Practice Direction. This provides that applications, aside from the CMC and PTR, are normally dealt with without a hearing unless the court considers a hearing is necessary. Standard directions are set out in the paragraph. After the 2<sup>nd</sup> March the parties filed written submissions on the amendment application, neither contending that it should be dealt with at a hearing. The matter came to me on paper. I agree that it did not require a hearing. This brief judgment was prepared without one.
7. There are tidying up amendments which are not objected to and I will make that order. The main amendments are to plead an entirely new issue, namely that terms in the 2015 contract operate to exclude or limit both defendants' liability. These are in proposed paragraphs 24A-24D of the draft Amended Points of Claim as well as paragraphs 1(3) and 28. Notably the two earlier contracts contain no such clause.

8. The court has a discretion whether to permit these amendments or not. The defendants contend that the discretion to be applied is simply one having regard to the overriding objective to deal with cases justly and at proportionate cost. Thus for example the defendants say that cases on “late” amendments do not apply. I will take the approach the defendants contend for as it is the most favourable to them. Approached that way, factors will include an explanation why the amendment arises now, the impact on the timetable of the issues raised by the amendments, the possible need for an adjournment, and/or whether the amendments are arguable.
9. In my judgment the decisive factors here are set out below.
10. First, no attempt has been made to explain the lateness of the application or why the point was not raised in the Points of Defence. This is an amendment which could and should have been advanced a year ago.
11. Second, the amendment relates to a clause which is only in the 2015 contract. The claimant contends that all the source code delivered up by the defendants in October 2018 pursuant to the court’s order had been created before the 2015 contract came into force. On the face of it therefore, it is hard to see how the limitation of liability in that contract could apply at all. Contract Schedule 200815, under which important work was done, was a schedule to the 2000 contract. On its face the work was to be done before the date of the 2015 contract. It seems from the written submissions that there will be a factual dispute about what exactly was done and when. This will add to the trial.
12. Third, even if some work was done after the 2015 contract came into force, part of the new case involves an argument that the limitation clause has retrospective effect. I doubt that is even arguable but assuming it is, it will also add to the trial.
13. Fourth, an important argument is that the limitation of liability term in a contract between the first defendant and the claimant applies to limit the second defendant’s personal liability. The plea is that the effect of the findings of fact in the trial judgment mean that the second defendant should be treated as a party to the contract. However this is not explained in the amended Points of Defence. In the written submissions the defendants’ counsel refers to various of the judge’s findings including a finding that the 1997 contract did not accurately reflect the true relationship between the claimant and the second defendant and that it was in fact one of employer and employee. It is clear that this is another complex issue. I will assume without deciding that the clause’s application for the benefit of the second defendant is arguable. It would require substantial time at trial to resolve.
14. Fifth, if the amendment is allowed the claimant must be allowed to respond. The claimant is likely to raise a point that the clause on its face does not apply to repudiatory breaches and separately a point on the Unfair Contract Terms Act. The defendants counsel’s response is that the repudiatory breach point only apply to the exclusion part of the clause and not the limitation limb (which would still limit the damages substantially), submitting it is a triable issue. So it is but it adds yet more to the case. In relation to the UCTA, I am not convinced by the defendants’ submission that the claimant’s point is unarguable and so that again would raise yet more issues, including factual matters, for trial.

15. Standing back, I reject the defendants' submission (para 1(b)) that this is something short which raises a confined point of construction. If this amendment is made it will raise a number of matters which would need to be examined at trial but which the current timetable cannot accommodate.
16. The Shorter Trial Scheme facilitates access to justice by encouraging parties to keep their dispute within limits and focus on the major issues. Parties to a case within the scheme know from the outset that the court will exercise its case management powers to achieve that result. A quid pro quo is that the short length of the trial allows parties to have their trial heard earlier than it would otherwise have been, and potentially ahead of other litigants. The scheme is not a means by which litigants can acquire an earlier date than they might otherwise have done and then expand the trial, taking up more of the court's resources. To simply expand the time for the trial beyond the limit in the scheme is not fair on other litigants and not in the interests of the administration of justice as a whole.
17. If the amendments are permitted, the trial would not fit in its allotted time. It would have to be adjourned to take its changes in the ordinary listing queue. I estimate that would introduce about a year's further delay. In no sense are these new points knock out arguments, at best they are arguable either way. To permit this amendment would not be in accordance with the overriding objective. I dismiss the application (save for the uncontentious part).
18. Another factor is paragraph 2.50 of the PD 57AB concerning the Shorter Trial Scheme. The parties have not addressed it, I think because at least the defendant took the view that the 2015 contract was already in the case. I have tackled the application without considering this provision but I will turn to it now. The Shorter Trial Scheme is based, to a significant degree although not completely, on the successful procedural code applicable in the Intellectual Property Enterprise Court (IPEC). That procedural code has been in force in IPEC and its predecessor for nearly ten years. It has demonstrated that civil disputes of some complexity can be streamlined fairly and effectively to the benefit of the parties, the administration of justice, and access to justice itself.
19. Paragraph 2.50 of PD 57AB provides that save in exceptional circumstances the court will not permit a party to submit material at trial in addition to that permitted at the CMC. This provision is based on the rule in IPEC at CPR r62.23(2). The IPEC rule is more stringent but only in that, as drafted, it provides that the court will not even consider an application for permission to submit material at trial in addition to that which was permitted at the CMC save in exceptional circumstances. However that difference is more apparent than real because in practice the IPEC rule is applied when considering the application. The substantive test is the same in IPEC and the STS.
20. In Redd v Red Legal [2012] EWPC 50 I addressed r63.23(2) and amendments to pleadings. The judgment was given in IPEC's predecessor the Patents County Court. The passage is at paragraphs 14-16:

“14. The nature of the case management regime in the Patents County Court as a whole has a bearing on applications of this kind. Just because an amendment might be allowed in another

case management regime, such as that applicable in the High Court, does not mean it will be allowed in the Patents County Court. Moreover, there is a further factor here. This is not an application to amend at the case management conference (CMC) and so rule 63.23(2) is engaged. Rule 63.23 provides as follows:

"(1) At the first case management conference after those defendants who intend to file and serve a defence have done so, the court will identify the issues and decide whether to make an order in accordance with paragraph 29.1 of Practice Direction 63.

(2) Save in exceptional circumstances the court will not consider an application by a party to submit material in addition to that ordered under paragraph (1)."

15. Not every amendment after the CMC will engage 63.23(2). For example a deletion amendment will likely not engage it. However this amendment undoubtedly engages that rule. The defendants wish, as a result of this amendment, to submit material in addition to the material ordered at the case management conference.

16. In my judgment the rule is intended to operate as a substantial hurdle. Apart from the obvious point that it refers to "exceptional circumstances" it is also notable that the rule is written in such a way that the application itself will not even be considered unless exceptional circumstances are in existence. The reason for this is because the case management conference is a key part of the package of measures in the Patents County Court procedure as whole. The identification of issues and the orders based on the issues made at the case management conference are all part of the overall costs capping and streamlined approach to litigation in the Patents County Court. It seems to me that the first question to be considered, before getting into general principles on amendment, is that raised by 63.23(2)."

21. These principles are applied today in IPEC (see e.g. the decisions of Mr David Stone sitting as a judge of that court in *Bayani v Taylor Bracewell* [2018] EWHC B5 (IPEC) and *MEI Fields Designs v Saffron Cards and Gifts* [2018] EWHC 1332 (IPEC)). Essentially the same substantial hurdle provided for by the IPEC version of this rule applies in the Shorter Trial Scheme. In the Shorter Trial Scheme the CMC has the same importance within the package of procedural measures as it has in IPEC.
22. In the present case the amendment, if permitted, would inevitably require the parties to submit material at trial over and above what was directed at the CMC. Therefore the provision applies. The defendants do not satisfy the test in paragraph 2.50 on any view.